
(2017) 09 BOM CK 0164
In the Bombay High Court
Case No : 389 of 2016

Lawrence Jose Fernandes

APPELLANT

Vs

Mr. Ramakant Yeshwant Pednekar, & Ors.

RESPONDENT

Date of Decision : 08-09-2017

Acts Referred:

Constitution of India, Article 227 -
Power of superintendence over all courts by the High Court
Code of Civil Procedure, 1908, Order
39 -
Cod

Citation : (2017) 09 BOM CK 0164

Hon'ble Judges : Nutan D. Sardessai

Bench : SINGLE BENCH

Advocate : Prasheen Lotlikar, Neelam Patil, D. Pangam, Luis Fernandes

Judgement

1. Heard Shri P.S. Lotlikar, learned Advocate for the petitioner and Shri D. Pangam, learned Advocate for the respondents no.1 to 11 while none appeared on behalf of the respondents no.12 & 13.

2. It was the contention of Shri P. Lotlikar, learned Advocate for the petitioner that the Trial Court had passed the impugned order to delete the name of the respondents no.12 & 13 from the proceedings and also to delete the issue of tenancy even though they had carved a specific case of tenancy in respect of the half of the suit property 308/1 unlike the respondents no.1 to 11 who had claimed the right to the entire property. The issue of tenancy was relevant and had to be referred to the Mamlatdar. He referred to the order passed by this Court dated 10/01/2017 and relied in the Division Bench judgment of this Court in Bhagwanrao Auti V/s. Ganpatrao Raut & Anr. [1987 3 BCR 258] and submitted that the respondents no.12 & 13 were necessary parties being some of the co-owners which was otherwise admitted by the respondents no.1 to 11 in their statement in defence apart from claiming tenancy. He further contended that the ratio in Smt. Palmira Valadares V/s. Shri Inacio Mariano Dias & Ors. [1998 (1)

GLT 220] was not in dispute but it was not attracted in the facts of the case. The issue of tenancy was referred by the Civil Court to the Mamlatdar and which was now pending before the Civil Court in view of the change of jurisdiction. The impugned order had therefore to be quashed and set aside in exercise of the powers of this Court under Article 227 of the Constitution of India and the petition had to be allowed.

3. Shri D. Pangam, learned Advocate for the respondents no.1 to 11 submitted at the outset that a bare reading of the plaint indicated that the petitioner had sought for the relief of injunction simpliciter against them who were not the landlords. A reading of the pleadings in the plaint revealed at para 30 that :

"30. The defendant no.12 and 13 do not dispute the tenancy of the plaintiffs and his predecessors in respect of the suit property."

As per the version of the petitioner, the respondents no.12 & 13 did not dispute the tenancy of the petitioner in respect of the southern portion of the suit property 308/1. The issue of tenancy would arise on assertion by one party and a denial by the other and in the face of the pleadings by the petitioner, such a plea could not arise on his own showing. He relied in *Palmira Valadares (supra)*, as also the judgment in *Anathula Sudhakar V/s. P. Buchi Reddy (Dead) by LR's & Ors. [AIR 2008 SC 2033]* and submitted that the judgment in *Bhagwanrao Auti (supra)* was watered down by that in *A. Sudhakar (supra)*. The remedy which was available to the petitioner was to avail a declaration under Section 7 of the Agricultural Tenancy Act before the Mamlatdar when on his own pleadings there was no cause of action against the respondents no.12 & 13. If at all the issue of tenancy was held implicit in the pleadings, there was no jurisdiction in the Civil Court and therefore the Trial Court had rightly allowed their application for deletion of the respondents no.12 & 13 as the party respondents to the suit and the deletion of the issue of tenancy. The petition was thus liable for dismissal.

4. The petitioner had filed the suit simpliciter for injunction on the ground that he was a tenant of a part of the property bearing Survey No.308/1 of Village Mandrem belonging in equal shares to the predecessors-in-title of the respondents no.12 & 13 respectively. The respondents no.1 to 11 were claiming to be the tenants in respect of the entire survey holding 308/1. The case of the petitioner was that he was the tenant of the plot B being the southern portion of the said property as a tenant of the respondents no.12 & 13, the suit property being leased to his late father prior to 1951 by the late father of the respondents no.12 and the predecessor of the respondents no.13. The petitioner and earlier his father were paying the rent and which was acknowledged by the receipts in the office of the respondents no.12 and there was an internal arrangement between the family of the respondents no.12 & 13 in respect of the distribution of the rent. The petitioner was the tenant and now the deemed owner of the southern portion of the suit property 308/1. There was no dispute by the respondents no.12 & 13 about his tenancy and that of his predecessors in respect of the suit property. However it was the respondents no.1 to 11 who had

suddenly entered in the suit property and caused objections necessitating the police complaint and the suit for the relief of injunction simpliciter to restrain the respondents no.1 to 11 from interfering with their possession of the suit property.

5. The respondents no.1 to 11 had set up a case that they were the tenants in respect of the entire property 308/1 and had no dispute with the respondents no.12 and 13 who were their landlords. They were neither necessary nor proper parties to the proceedings and the Civil Court had no jurisdiction to deal with the matter. The petitioner had no right whatsoever in the suit property or any portion thereof particularly the southern portion as claimed by him and hence the suit was liable for dismissal with compensatory costs. The respondents no.1 to 11 had carved a specific plea that one Pascol Fernandes had filed a tenancy case against Hari Pednekar and others claiming tenancy to the entire property which was defended by them and dismissed in February, 1985 on the premise that they were in possession of the entire property. There were proceedings also under Section 145 of the Criminal Procedure Code between said Hari Pednekar and others and one Devu Mandrekar, where the Executive Magistrate had declared Hari Pednekar and others to be in possession of the entire property 308/1. They had also received the notice of the land acquisition dated 16/05/2002 and the compensation was disbursed in the name of their predecessor which was recorded in the tenants column. They had also filed the suit being Regular Civil Suit No.97/1978 in the Court of the Civil Judge Junior Division, Pernem in which the present petitioner had not participated as he had no right of whatsoever nature. They were the tenants of the entire property belonging to the respondents no.12 & 13 and hence the suit was liable for dismissal with exemplary costs.

6. In *Palmira Valadares (supra)*, the point which was sought to be raised for determination was whether in a suit for permanent injunction filed by a person claiming to be the tenant in respect of a property against another person claiming to be the tenant in respect of the same property would lie before the Mamlatdar under the Agricultural Tenancy Act or not. The petitioner in that case had claimed that she was the tenant in possession of the property bearing Survey No.280/1 and 288/1 of the Village Carambolim and that the property belonged to the Comunidade of Carambolim. The petitioner also claimed to have been declared as a tenant by the Mamlatdar under Section 7 of the Goa, Daman and Diu Agricultural Tenancy Act, 1964. The respondents no.1 to 11 filed the suit for injunction against the petitioner in respect of the same property while setting up a claim of tenancy. It was their contention that the petitioner had obtained the order declaring her as the tenant in collusion with the Comunidade of Carambolim. The petitioner contested the suit on the premise that the Civil Court had no jurisdiction to entertain the dispute and the jurisdiction vested with the Mamlatdar. The Civil Court refused the relief of temporary injunction on the ground that it had no jurisdiction to entertain the suit which order was confirmed by the Additional District Judge in an appeal against the same while the learned Single Judge of this Court was pleased to

allow the same in the revision application filed by the respondent against the order of the Additional District Judge holding that the jurisdiction to entertain the same for perpetual injunction between two persons claiming to be the tenants of the suit property vested with the Civil Court and under Section 3-A of the Act only the dispute between the tenant and the landlord are contemplated and as such the dispute between the two persons claiming to be the tenants were outside the purview of Section 8-A of the said Act. The learned Single Judge ultimately held that the suit for perpetual injunction between two persons claiming to be the tenants lies with the Civil Court. Section 8-A is not available to any person other than a tenant and certainly not against any person other than the landlord or a person claiming through him.

7. In *Bhagwanrao Auti (supra)*, the question which was referred for the decision of the Division Bench was whether in a suit simpliciter for a permanent injunction, was it necessary to frame an issue of tenancy either of the plaintiff or of the defendant. *Bhagwanrao Auti* had filed a suit for permanent injunction simpliciter for restraining the respondents defendants from disturbing his possession over the suit field. He claimed to be a tenant in possession of the suit field by virtue of the *Batai Patrak* dated 8/05/1976 executed by the respondents no.1 in his favour unlike the respondents no.1 who disputed his possession over the suit field much less by virtue of the alleged *Batai Patrak*. The petitioner obtained the injunction which was confirmed throughout and was still subsisting. Several issues were framed by the Civil Court and one being whether the petitioner proved his possession of the suit land on the basis of the *Batai Patrak*. He sought a reference of this issue to the tenancy authority for decision which was rejected by the Civil Court by an order dated 15/01/1983. The petitioner as the plaintiff challenged the order of rejection of the said issue in revision. The respondents too preferred a Civil Revision Application for modification of the issue no.1 contending inter alia that in a suit simpliciter for injunction an issue as regards tenancy was not required to be decided, as it was not involved within the meaning of Section 99-A of the Hyderabad Tenancy Act. The issue about the tenancy was not involved in the suit of this nature and the reference to Tenancy Court made by the Civil Court was uncalled for and without jurisdiction. The learned Single Judge who heard both the revision petitions found that there was a conflict of decisions of this Court on the question as to whether in a suit simpliciter for injunction, an issue as regards tenancy of either plaintiff or defendant was involved and whether it was required to be referred to the Tenancy Court for decision and accordingly the reference was made to the Division Bench for decision.

8. In *Bhagwanrao Auti (supra)*, the Division Bench in its opinion observed that the question of necessity of framing an issue of tenancy, or for that matter, considering the question of tenancy, either of the plaintiff or of the defendant, in a suit simpliciter for permanent injunction, could be resolved having regard to the nature of the relief claimed in such a suit simpliciter for injunction. The Division Bench considered the question canvassed at length before them about

the necessity of the issue being referred before considering an application for temporary injunction under Order XXXIX of the Code of Civil Procedure. The Division Bench considered the judgment in *Shrawan Bagaji Nadre & Ors. V/s. Arun Manikraj Kadam* [1982 Mah.L.J. 777] where a learned Single Judge held that in a suit for perpetual injunction, temporary injunction could not be granted, unless the Tenancy Court adjudicated upon the plaintiff's tenancy rights and that in *Laxmi w/o Sonu & Ors. V/s. Sawanta Bapu Mali* [1985 Mah.L.J. 314] where a contrary view was expressed by another single Judge. Ultimately, it was held that in their opinion while temporary injunction could be granted without referring the question of tenancy to the Tenancy Court, a relief of permanent injunction on merits could not be granted in a suit simpliciter for permanent injunction, unless the issue was raised, referred and decided by the Tenancy Court in accordance with the provisions of the Tenancy Court. The Division Bench ultimately held that in a suit simpliciter for permanent injunction, it was necessary to frame an issue of tenancy either in favour of the plaintiff or the defendant, as the case may be. This judgment with respect is clearly distinguishable in the facts of the present case wherein the petitioner was claiming to be a tenant of the respondents no.12 & 13 unlike the contesting respondents no.1 to 11 who were claiming tenancy rights but in respect of the entire suit property and not against the contesting respondents no.1 to 11.

9. In *Anathula Sudhakar* (supra), the Hon'ble Apex Court summarised the position in regard to suits for prohibitory injunction relating to immovable property at para 17 as under:

17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in *Annaimuthu Thevar* (supra)]. Where the averments

regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

10. There is force in the contention of Shri Lotlikar, learned Advocate for the petitioner that Anathula Sudhakar (supra), dealt with the aspect of prohibitory injunction under the Specific Relief Act unlike Bhagwanrao Auti (supra), which dealt with the issue under the subject statute of agricultural tenancy. Nonetheless, looking to the tenor of the pleadings in the present case, on the petitioner's own showing the respondents no.12 & 13 were not at all necessary parties to the proceedings considering the fact also that no relief of whatsoever nature was claimed against them. The learned Trial Court had rightly addressed herself to the question whether the Court would be able to pass an effective decree in case the names of the respondents no.12 & 13 were struck off from the proceedings. The Trial Court was equally seized off the fact that the dispute in the suit at large before her was between THE two sets of parties who were claiming to be the tenants of the same property and in which the petitioner had not at all sought for any declaratory relief qua his status as a tenant. The learned Trial Court had also properly applied the ratio in Palmira Valadares (supra), and held that the issue of tenancy did not arise for determination and in that view of the matter ordered its deletion.

11. The learned Trial Court had therefore not committed any jurisdictional error either within or outside the jurisdiction as to justify interference by this Court in exercise of its powers of superintendence under Article 227 of the Constitution of India. The impugned order therefore does not call for any interference and in view thereof the Writ petition is dismissed with no order as to costs.

JUDGMENT CONTINUED :

12. The parties are directed to appear before the learned Civil Judge Junior Division at Pernem on 26.09.2017 at 10.00 hours. Hence, the proceedings before

the Trial Court stand vacated.